S. Ct. No. 89834-1
COA No. 30732-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT MARTINEZ, JR., Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Martinez, Jr., asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals which Mr. Martinez wants reviewed was filed on December 26, 2013. A copy of the decision is in the Appendix at pages A-1 through A- 12.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err by admitting prejudicial hearsay Evidence based on the excited utterance exception, thus warranting a new trial?

2. Did the court err by prohibiting evidence of prior consensual sex between Ms. Harris and Joe Villareal and examination of the State's lab expert as to findings regarding Mr. Villareal under RCW 9.94A.020 and ER 404(b)?

3. By counting as a strike Mr. Martinez's conviction for a California second degree robbery committed prior to the effective date of the POAA, did the court violate the ex post facto prohibition?

D. STATEMENT OF THE CASE

Mr. Martinez was charged by information with count 1 – second degree rape, count 2 – second degree assault, and count 3 – unlawful imprisonment. (CP 1). The State filed a persistent offender notification. (CP 44). In a pretrial motion pertaining to RCW 9A.44.020, the rape shield statute, the court barred "the admission of, or allusions to any prior consensual sexual activities involving the alleged victim Patricia L. Harris and any other person." (CP 209; 1/19/12 RP 101-04; 1/25/12 RP 307).

On May 14, 2010, Ms. Harris was having a barbeque at her Clarkston house for the birthday of Mr. Martinez, with whom she had a relationship. (1/24/12 RP 252, 272). A friend, Kevin Holm, was there all day. (*Id.*). Mr. Martinez showed up and Mr. Holm took him to get alcohol. (*Id.* at 253, 296). Mr. Martinez was fairly intoxicated and upset with Ms. Harris because she had not kept in contact with him while he was in jail. (*Id.* at 253). He felt she had "done him dirty." (*Id.*). His anger caused her some concern, so she asked Mr. Holm to stay. (*Id.*). Mr. Martinez left, whereupon Mr. Holm did as well. (*Id.* at 254).

Mr. Martinez came back. Ms. Harris thought it was her friend, Amber Grimm. (1/24/12 RP 255). She saw it was Mr.

Martinez, who pushed his way in to talk about things. (*Id.*). He was upset and getting angry; she was crying and scared. (*Id.*). He wanted to have sex, but she did not. (*Id.* at 256). Mr. Martinez said he was going to take it and wanted anal sex. (*Id.*).

He took her by the hair and dragged her into the bedroom, struggling. (1/24/12 RP 256). She said Mr. Martinez had both hands around her neck. (*Id.*). Ms. Harris identified the post to a lip ring that had been ripped out. (*Id.*). She said he raped her anally. (*Id.* at 257, 277). The phone rang and startled Mr. Martinez. (*Id.*). Someone knocked on the door; it was Ms. Grimm. (*Id.* at 258).

Wrapped in a blanket, Ms. Harris answered the door. (1/24/12 RP 258). She stepped out and had a cigarette with Ms. Grimm. (*Id.* at 260). Mr. Martinez joined them at the door and told Ms. Grimm he fucked up. (*Id.*). The women came in at one point with Mr. Martinez still saying Ms. Harris had done him dirty. (*Id.*). With Ms. Grimm there, he went into the kitchen and grabbed a knife. (*Id.*). Ms. Harris told Ms. Grimm he had raped her. (*Id.*). With him at the house, Ms. Harris felt she was not free to leave and get away. (*Id.*). Ms. Grimm got a call from Doug Wassmuth and Mr. Martinez got on the phone. (*Id.* at 262). He dressed and left. (*Id.* at 263)

Another friend, Nick Elsoto, arrived and took Ms. Harris to St. Joseph's Hospital. (1/24/12 at 263). She told hospital personnel she had been raped. (*Id.*). Ms. Harris testified she asked for care and was "probably" frantic, crying, and scared. (*Id.* at 264). She was shook up while talking to a police officer who arrived. (*Id.*). She talked to a doctor and a rape kit was done hours later. (*Id.* at 265). Ms. Harris thought Mr. Martinez had gone to Spokane and then to Los Angeles. (*Id.* at 269). He regularly kept in contact with her during that time following the May 14 incident. (*Id.*). On cross examination, Ms. Harris admitted having consensual anal sex with Mr. Martinez the day before, May 13. (*Id.* at 277, 281, 293).

Over defense objection, Ms. Grimm testified that Ms. Harris whispered she had been raped by Mr. Martinez. (1/25/12 RP 316-19). Ms. Grimm kept asking him to leave, but he told her and Ms. Harris he was going to keep them hostage and they were not going to leave. (*Id.* at 324). Ms. Grimm felt she and Ms. Harris were not free to leave. (*Id.*). A friend, Ryan Williams arrived at the house after Mr. Martinez left. (*Id.* at 325-26). Another friend, Nick, took Ms. Harris to the hospital. (*Id.* at 326). Ms. Grimm did not go and

instead went to see her boyfriend, Mr. Wassmuth, who was working at Lancer Lanes Casino, with Mr. Williams. (*Id.* at 327).

Mr. Martinez showed up at Lancer Lanes and talked to Mr. Wassmuth. (1/24/12 RP at 328). He asked him and Mr. Williams to take him out back and beat him up for what he did. (*Id.*).

Nyla Roach, a registered emergency nurse at St. Joseph's Regional Medical Center in Lewiston, testified Ms. Harris said she was anally raped in her home. (1/25/12 RP at 334, 336, 337). Clarkston Police Officer Danny Combs saw Ms. Harris at St. Joseph's. (1/25/12 RP 384, 385). She was distraught. (*Id.* at 386).

Clarkston Police Sergeant Josh Daniel tried to find Mr. Martinez at the Sunset Motel, but could not locate him. (*Id.* at 368, 371). Mr. Martinez was later arrested in California. (*Id.* at 371).

Clarkston Police Officer Jeremy Foss was dispatched to St. Joseph's on May 14, 2010, for a sex offense call. (1/24/12 RP 218-19). He contacted Ms. Harris, who was upset about something that had happened about two hours before. (*Id.* at 220). Ms. Harris told him Mr. Martinez had anally raped her. (*Id.* at 230).

Dr. Matthew Lisne, a physician at St. Joseph's, saw Ms. Harris on May 14, 2010, regarding a sexual assault. (1/26/12 RP 458). She said she was raped and penetrated rectally. (*Id.* at 460).

Dr. Michael Lin, WSP DNA analyst, said Mr. Martinez was a potential contributor of DNA from the anal swab extracts. (1/26/12 RP 474-75). Dr. Lin said the profile matching Mr. Martinez would not be expected to occur more frequently than one in 500 male individuals, not a phenomenal number. (*Id.* at 475-76). Outside the presence of the jury upon examination by defense counsel, Dr. Lin testified a major profile on the DNA matched that of Joe Villareal.(*Id.* at 476-77). The defense had no questions for Dr. Lin as to the DNA match for Mr. Villareal because of the court's order barring any evidence of consensual sexual activities involving Ms. Harris and any other person. (*Id.* at 477; CP 209).

Mr. Martinez testified in his own defense. (1/25/12 RP 401). He had been in prison for about 20 months before returning to the Clarkston area on May 12, 2010. (*Id.*). He got really drunk on May 14, the day of the barbeque for his birthday. (*Id.* at 407). Mr. Holm had given him a ride to the liquor store. (*Id.* at 406). Mr. Martinez was at Ms. Harris's house on May 12, 13, and 14. (*Id.* at 405). He left several times during the day on March 14 and returned around 8 or 8:30 p.m. (*Id.* at 408). Ms. Harris let him in and they had consensual anal sex as it was a preference. (*Id.* at 409).

After having sex, they had a verbal dispute because Ms. Harris did not want to be with him anymore. (*Id.* at 414-16). She hit him with a frying pan. (*Id.* at 416). They scuffled. (*Id.*). He is six-four; Ms. Harris is five-four. (*Id.* at 417). When he told people he had fucked up, he meant he had hit her. (*Id.* at 420). He never said she done him dirty. (*Id.* at 427

The jury convicted Mr. Martinez of second degree rape and unlawful imprisonment and found him not guilty of second degree assault, but convicted him of fourth degree assault. (1/26/12 RP 546-47; CP 249, 250).

The court sentenced Mr. Martinez to life in prison without the possibility of release for the second degree rape and 364 days for the fourth degree assault and 60 months for unlawful imprisonment, with the latter two terms running concurrently with the life term. (CP 325; 3/27/12 RP 78-79).

The Court of Appeals affirmed his conviction and sentence by unpublished opinion on December 26, 2013. (App. A-1).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted by this court because the Court of Appeals decision conflicts with decisions of the Supreme Court and other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

1. The excited utterance exception

Over defense hearsay objections, the court determined the first few minutes of Officer Foss's contact with Ms. Harris at St. Joseph's when she indicated Mr. Martinez raped her, were admissible under the excited utterance exception. (1/24/12 RP 228-29). Likewise, the court also found Ms. Harris's statement to Amber Grimm that Mr. Martinez had raped her was admissible under the exception as well. (1/24/12 RP 318). The court erred.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801 (a), (c). Hearsay is inadmissible unless there is an exception. ER 802. There are exceptions based on the circumstances when they were made that show the reliability of the inherently unreliable statements. *State v. Young*, 160 Wn.2d 799, 822-23, 161 P.3d 967 (2007). The excited utterance exception in ER 803(a)(2) is one:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The reason for it was explained in *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992):

> [U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and

> removes their control. The utterance of a person in such a state is believed to be a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest.
> Here, the startling event or condition was the rape. (4/19/12 RP 262-67).

The touchstone of reliability is that the utterance of a person in such a shocked state must have been a spontaneous and sincere response to the perceptions produced by the shock. And there is a temporal proximity element that must be sufficient to show that the declarant was indeed under this shocked state so as to be spontaneous. *See State v. Sharp*, 80 Wn. App. 457, 909 P.2d 1333 (1996); *State v. Davis*, 141 Wn.2d 798, 845, 10 P.3d 977 (2000) (time between event and statement "sufficiently slight").

With respect to Ms. Grimm's testimony, the evidence was that Ms. Harris came outside and smoked a cigarette with her, conversed intelligently and coherently, and had knowledge of what was going on. (1/24/12 RP 318). Ms. Harris was not in a shocked state at all, but was in control. Although the trial court is usually accorded deference in its evidentiary decisions, none should be when the excited utterance exception is at issue. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

Instead of a spontaneous response, Ms. Harris had time to reflect and protect her self-interest in having him out of her life. (CP The statement was not an excited utterance and thus bears no indicia of reliability to take it out of the hearsay prohibition. *Chapin*, *supra*.

Ms. Harris's statement to Officer Foss was made 1½ to 2 hours after the incident. (1/24/12 RP 220). She was upset or excited, and was rocking. (*Id.* at 223-24). But this was not enough even for the trial judge, who allowed the State to ask further questions in an attempt to show an excited utterance. (*Id.*). After this attempt, the court excused the jury and asked questions of Officer Foss itself as the foundation laid by the State was insufficient. (*Id.* at 226). The court then ruled that the first few minutes of the officer's colloquy with Ms. Harris clearly fell within the excited utterance exception, but the remainder of the interview did not. (*Id.* at 228-29).

The ruling, however, makes a distinction without a difference because the evidence showed Ms. Harris's demeanor was the same throughout. (*Id.* at 227). She had no difficulty communicating or intelligently responding. (*Id.* at 227-28). In these circumstances, there was no "sufficiently slight" attenuation

between the event and her statement to the officer. *Davis*, 141 Wn.2d at 845. Moreover, there was nothing in the record to show a change in Ms. Harris's state to justify application of the excited utterance exception for the first few minutes of her talk with Officer Foss, much less the rest of it. The court erred by allowing Officer Foss to testify Ms. Harris told him Mr. Martinez raped her.

Its decision was legally incorrect and is not accorded deference in any event. *Brown*, 127 Wn.2d at 758. Even so, a decision based on an incorrect legal analysis or error of law is an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 967 (2007).

An evidentiary error that does not violate the constitution requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Here, the case against Mr. Martinez boiled down to "he said-she said." The court's admission of hearsay statements to bolster Ms. Harris's credibility was improper and materially affected the trial. Combined with the defense's inability to proffer evidence of her motive to get Mr. Martinez out of her life, the evidence was unduly prejudicial and warrants the granting of a new trial. *Id.*

Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals decision is in conflict with other decisions of the Court of Appeals and the Supreme Court. *Brown*, *supra*; *see Warner v. Regent Assisted Living*, 132 Wn. App. 126, 140-41, 130 P.3d 865 (2006).

2. Prohibited evidence of consensual sex between Ms. Harris and Joe Villareal and inquiry of the State's lab expert as to findings regarding Mr. Villareal under RCW 9A.44.020(3) and ER 404(b)

RCW 9A.44.020(3)(a) provides:

> (3) In any prosecution for the crime of rape . . . evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores common to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:
>
> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

Mr. Martinez made that pretrial motion and offer of proof. (CP 142-45). He asked for an order allowing (1) testimony about

past consensual sex with Ms. Harris on May 13, 2010; (2) testimony about a sexual encounter with Joe Villareal on May 13 or 14, 2010; and (3) examination of the State's lab expert as to findings regarding Joe Villareal. (CP 142). The relevancy of the evidence was this:

> Defendant believes that on May 14, 2010 after consensual sex, they became embroiled in a dispute precipitated by the alleged victim's actions, and then she in anger or by premeditated planning, used such happening to have him falsely arrested for rape and second degree assault as well as unlawful imprisonment, so she could prevail in the dispute and have him incarcerated to remove him from her life. Defendant would also admit that he may have been somewhat impaired by alcohol and drug intoxication, and upon being falsely accused of rape and other crimes responded poorly to a difficult situation.
>
> The Defendant asserts that testimony concerning the above reference[d] past sexual behavior between the alleged victim and Defendant, Robert Martinez, Jr., as well as that between alleged victim and Joe M. Villareal are both extremely germane and relevant to the limited issue of motive of the alleged victim to falsely accuse Defendant of the crimes set out in the criminal information file[d] herein. Furthermore, any exclusion at trial of said evidence proposed by Defendant would result in denial of substantial justice to the Defendant by preventing him as a practical matter from presenting his actual defense and defense theories at trial. (CP 144-45).

Determining the evidence was highly prejudicial to the alleged victim and barred by RCW 9A.44.020 and ER 404(b), the court ordered:

> The Court bars the admission of, or allusions to any prior consensual activities involving the alleged victim, Patricia L. Harris is barred by application of RCW 9A.44.020, commonly known as "the Rape Shield Statute." Further, the Rules of Evidence, specifically ER 404(b) prohibit the admission [of[evidence of "other acts" to prove the character of a person "in order to show action in conformity therewith." Evidence of prior consensual sexual activities between the Defendant and the alleged victim clearly falls within the prohibition of this rule. (CP 208-09).

Although evidence of prior consensual sex between Mr. Martinez and Ms. Harris was barred, testimony came in that she did have consensual sex with him on May 13, 2010. (1/24/12 RP 277, 281, 293). But the evidence that a major profile on the DNA matched Mr. Villareal did not come in. (1/26/12 RP 476-77). The offer of proof with evidence of Ms. Harris's motive for fabricating her accusations against Mr. Martinez also did not come in. By prohibiting this evidence, the court did not give Mr. Martinez the opportunity to present his defense theory as it did not run afoul of RCW 9A.44.020(3) or ER 404(b).

Mr. Martinez sought to admit evidence of Ms. Harris's relationship with Mr. Villareal only on the limited issue of her motive to false accuse him of the crimes as shown in the offer of proof. (CP 143-45). RCW 9A44.020(3) does not prohibit such evidence of motive. Furthermore, evidence of motive is not barred by ER 404(b) that prohibits the admission of "other acts" evidence to prove the character of a person "in order to show action in conformity therewith." ER 404(b) by its very language permits the admission of such evidence to show proof of motive. That is precisely what the defense sought to do here. The court erred by barring evidence of Ms. Harris's relationship with Mr. Villareal and any examination of the State's lab expert as to DNA findings regarding Mr. Villareal as both went to motive and were not prohibited by the rape shield statute or ER 404(b).

The court's erroneous decision on this evidentiary ruling materially affected the trial's outcome. But for the error, Mr. Martinez was prevented from fully presenting his defense and theory of the case. *Hamlet*, 133 Wn.2d at 327. On the second degree assault count, the jury found him guilty of the lesser included offense of fourth degree assault. Without the proof of motive proffered by Mr. Martinez, however, the jury did not get the

full story behind the alleged rape and unlawful imprisonment. With this backdrop, there can be little doubt that Mr. Martinez's defense was so prejudicially restricted by the erroneous ruling as to materially affect the trial's outcome.

The Court of Appeals decision conflicts with other decisions of the Court of Appeals and the Supreme Court properly interpreting the rape shield statute and ER 404(b). *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010); *State v. Mounsey*, 31 Wn. App. 511, 643 P.2d 892, *review denied*, 97 Wn.2d 1028 (1982); *State v. Cosden*, 18 Wn. App. 213, 568 P.2d 802 (1977), *review denied*, 89 Wn.2d 1016, *cert. denied*, 439 U.S. 823 (1978). It erroneously believed that Mr. Martinez wanted the evidence to come in to show consent. But he did not want it for that purpose. Review is warranted.

3. The court's counting as a strike Mr. Martinez's prior California conviction for an offense committed prior to the effective date of the POAA

Mr. Martinez was convicted on January 19, 1993, for second degree robbery in California. (CP 290). The POAA was passed by Washington voters in November 1993 by Initiative 593. Defense counsel made this argument:

[N]umerous times during the handling of this case I had referred to the [POAA] statutes and the finding statutes and it included unfortunately that all the acts asserted as strike offenses by the State would qualify as strike offenses. However, in revisiting the [POAA] statute and visiting our ex post facto constitutional article, it would appear to me that allowing the State to go back and to apply retroactively instead of prospectively the POAA statutes to crimes that were committed prior to its adoption by the voters of this state was really basically an ex post facto statute. Now in [*Angehrn*] my reading of the statute or that case I mean in [*Angehrn*] was that every one of the offenses involved in that case occurred after passage of [POAA]. The issue there was they were arguing that it was ex post facto to ever go back from the current offense backward and in effect enhance punishment on the new offense or the current offense by considering the past crimes that had already been committed and punished for. And that in essence that was ex post facto law by virtue of the logic that you increase significantly the punishment on the new offense or the current offense by considering the past crimes that had already been punished. The Courts, including the State, have not bought into that argument. I think there's some merit to it by I get stuck with what the Courts decide. More importantly, I might point out, that Division III has never come down with a case that clearly adopts the position that it's not a violation of ex post facto to apply [POAA] to a case in a conviction that occurred prior to the adoption of the statute. Now, our Court may well, if it gets to that type of case, issue such a ruling because they have denied certain on a couple occasions but I'm cognizant as the Court is cognizant the new makeup of the Court is somewhat different than what it used to be and so I raise this issue because I want to preserve that for appeal and the appellate paperwork that I drafted up has

that in there. (3/27/12 RP 73-74).

The court determined that using the 1993 California second degree robbery conviction as a strike did not violate ex post facto laws:

> And, and while I do note that the California conviction was on January 19 of '93, and that the persistent offender sentencing act didn't come into effect until November of '93, that one was, did predate the statute, the key analysis is simply did the persistent offender sentencing act increase the punishment for any crime that was committed by you prior to the enactment of the statute and it did not. Whatever you got for your California conviction, you've already done our time on that. And that law, the three strikes and you're out law in Washington, didn't do anything to increase your punishment under that California conviction. And since it did not, it does not violate the ex post facto law. In point of fact, in '99, as pointed out by the state in the guilty plea statement, you were fully informed of the existence of that statute then. So you knew that if you ever got convicted, or had been put on notice, maybe you didn't know but you were definitely put on notice, that if you ever got convicted of another offense that constituted a most serious violent offense under Washington State law, that would be your third strike and if it happened in Washington, the Court would have to give you life without the possibility of release. (3/27/12 RP 78).

The ex post facto clause, U.S. Const., art. 1, § 10, bars application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798). A

law violates the ex post facto clause if it (1) is substantive, not merely procedural; (2) is retrospective (applies to events occurring before the enactment); and (3) disadvantages the person affected by it. *In re Personal Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). Statutes usually operate prospectively to give fair warning that a violation will result in specific consequences. *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).

In general, Washington courts have held there is no ex post facto problem when a sentencing statute directs the use of an offender's prior convictions to enhance the sentence for a crime committed after the statute goes into effect. *See, e.g., State v. Angehrn*, 90 Wn. App. 339, 952 P.2d 195, *review denied*, 136 Wn.2d 1017 (1998), *cert. denied*, 528 U.S. 833 (1999) (rejecting ex post facto challenge to POAA because mandatory life sentence triggered only upon third conviction for a most serious offense, and statute was enacted before defendant's third most serious offense); *In re Williams*, 111 Wn.2d 353, 363, 759 P.2d 436 (1988) (use of prior juvenile convictions to determine sentence for adult crime did not constitute additional punishment for the prior conduct).

This case gives the Supreme Court the opportunity to squarely address the issue raised by Mr. Martinez whether a prior

conviction predating the effective date of the POAA can be counted as a strike without violating the ex post facto prohibition. The POAA is substantive, is retrospective as it applies to events occurring before its enactment, and disadvantages the person affected by it. *Powell*, 117 Wn.2d at 185. All the elements for finding an ex post facto violation are present here. *Angehm* is not dispositive under Mr. Martinez's circumstances. Review is warranted under RAP 13.4(b)(1) and/or (2).

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Martinez respectfully urges this court to grant his petition for review.

DATED this 23rd day of January, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 23, 2014, I served a copy of the petition for review by first class mail on Robert Martinez, Jr., # 792711, 1313 N. 13th Ave., Walla Walla, WA 99362; and Benjamin C. Nichols, Asotin County Prosecutor, PO Box 220, Asotin, WA 99402.

Kenneth H. Kato

APPENDIX

FILED
DEC. 26, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROBERT MARTINEZ, Jr., Appellant.	)	No. 30732-8-III UNPUBLISHED OPINION

BROWN, J. — Robert Martinez appeals his second degree rape, fourth degree assault, and unlawful imprisonment convictions and sentence. Mr. Martinez contends the trial court erred in admitting hearsay evidence and counting his prior second degree robbery conviction in California under Washington's Persistent Offender Accountability Act (POAA), chapter 9.94A RCW. Finding no error, we affirm.

FACTS

Mr. Martinez and P.H. started a relationship in 2003 and have three children. Mr. Martinez was incarcerated from the fall of 2008 until May 12, 2010. On May 14, P.H. hosted a barbeque for Mr. Martinez's birthday at her house. Mr. Martinez was intoxicated and upset with P.H. for not keeping in better contact with him while he was in jail. He left but returned to P.H.'s home later in the evening. Mr. Martinez wanted to have sex; P.H. did not. According to P.H., Mr. Martinez was angry and took her by the

hair and dragged her into the bedroom. She struggled as he ripped her clothes off. Mr. Martinez placed both hands around her neck in attempt to choke P.H. and then raped her anally.

P.H.'s friend, Amber Grimm, knocked on the door. P.H. wrapped herself in a blanket and answered the door. Ms. Grimm observed a bruise on P.H.'s forehead and red marks around her neck. P.H. appeared "very, very frantic." Report of Proceedings (RP) at 313. Ms. Grimm asked P.H. to step out on the porch with her to have a cigarette. After a few minutes, the women went inside and sat on the couch. P.H. then whispered to Ms. Grimm that Mr. Martinez just raped her. Mr. Martinez then approached the women and stated he "fucked up." RP at 260. He went into the kitchen and grabbed a knife and threatened to kill himself. Mr. Martinez finally left and P.H. went to the hospital.

P.H. told hospital personnel she had been raped. Clarkston Police Officer Jeremy Foss was dispatched to the hospital to investigate. When he walked into the hospital room, Officer Foss observed P.H. had multiple red marks and small scratches around her upper chest and on her throat area, a bruise with a bleeding scratch on her forehead, and some bruising on her arms. He also observed her sitting on a chair and "rocking back and forth. She was, you could definitely tell that she was excited or upset about something . . . ." RP at 220. P.H. reported Mr. Martinez had raped her anally approximately one and one-half to two hours prior.

The State charged Mr. Martinez with second degree rape, second degree assault, and unlawful imprisonment. The State filed a persistent offender notification, notifying Mr. Martinez that if convicted he would face a sentence of life without the possibility of parole.

Pretrial, after considering RCW 9A.44.020, the rape shield statute, the court barred "the admission of, or allusions to any prior consensual sexual activities involving the alleged victim . . . and any other person." Clerk's Papers at 209.

During trial, and over a defense objection, Ms. Grimm testified P.H. whispered to her that Mr. Martinez had raped her. The court allowed the hearsay testimony under the excited utterance exception.

Over a defense objection, Officer Foss was permitted to testify to P.H.'s statement at the hospital that Mr. Martinez raped her. In allowing the testimony, the court found, "[C]ertainly the first few minutes of the officer's colloquy with [P.H.], clearly her comments clearly fall under the excited utterance exception to the hearsay rule. Beyond the first few minutes of that conversation, though, I believe that it became as usual a routine, not routine, but [standard operating procedure] SOP type investigation in progress, so I will sustain the objection in part but overrule it in part." RP at 228. Hospital personnel testified, without objection, that P.H. reported she had been raped.

Dr. Michael Lin, a deoxyribonucleic acid (DNA) analyst testified that Mr. Martinez's DNA was found on P.H.'s anal swab extracts. And, Dr. Lin found DNA

matching Joe Villarreal but his evidence was excluded from the jury under the rape shield law.

Mr. Martinez testified the sex was consensual. The jury found Mr. Martinez guilty of second degree rape, fourth degree assault, and unlawful imprisonment. Because Mr. Martinez had a 1993 second degree robbery conviction from California and a 1999 first degree robbery conviction from Washington which was part of his criminal history, the court sentenced Mr. Martinez to life in prison without the possibility of early release under the POAA. Mr. Martinez appealed.

ANALYSIS

A. Evidence Rulings

The issue is whether the trial court erred in evidence rulings, first, admitting evidence under the excited utterance exception to the rule excluding hearsay and, second, excluding evidence under the rape shield statute. Mr. Martinez argues the testimony from Ms. Grimm and Officer Foss should have been disallowed and the DNA evidence concerning Mr. Villarreal's contact with P.H. should have been allowed in evidence.

We review evidentiary rulings for abuse of discretion. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Substantial deference is given to the trial court's rulings. *State v. Wade*, 138 Wn.2d 460, 463-64, 979 P.2d 850 (1999). Mr. Martinez argues for a higher standard of review for evidence admitted under the excited utterance exception, but *State v. Briscoeray*, 95 Wn. App. 167, 171, 974 P.2d 912

(1999) makes clear the abuse of discretion standard is the correct standard for analyzing excited utterances. Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

First, although hearsay is generally inadmissible, ER 803(a)(2) provides that certain excited utterances may be admissible. *State v. Magers*, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). A statement qualifies as an excited utterance if "(1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event." *Id.* at 187-88.

The declarant must make the statement while still "under the influence of external physical shock" and without "time to calm down enough to make a calculated statement based on self-interest." *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). The declarant must make the statement while so "'under the influence of the event . . . that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (second alteration in original) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Courts generally consider (1) the amount of time between the event and when the declarant makes the statement and (2) the declarant's observable level of emotional stress when making the statement. *See, e.g., Strauss*, 119 Wn.2d 416-17.

Here, P.H. opened the door directly after the alleged rape occurred. She was wrapped in just a blanket. She appeared "very, very frantic" and with a bruise on her forehead and red marks around her neck. RP at 313. Within minutes of Ms. Grimm's arrival, P.H. whispered to her that Mr. Martinez just raped her. Because a starting event had just occurred and P.H. was still under the stress of the event, her statement regarding the event to Ms. Grimm was permissible hearsay under the excited utterance exception. The trial court had tenable grounds in admitting it.

Turning to P.H.'s statement to Officer Foss, Mr. Martinez argues the passage of time gave P.H. time to calm down and make a calculated statement to the officer. "The passage of time alone, however, is not dispositive." *Strauss*, 119 Wn.2d at 417. In *Strauss*, our Supreme Court held a rape victim was still under the influence of the incident when she made the statement even though more than three hours may have passed. *Id.* at 416-17. There, the victim appeared to be in a state of shock; the officer described the victim as "very distraught, very red in the face and crying." *Id.* at 416. Similarly, a statement made in a record that indicated a range of six to seven hours after an event can still be an excited utterance where the declarant is still under the stress of that event. *State v. Thomas*, 46 Wn. App. 280, 282, 284-85, 730 P.2d 117 (1986), *aff'd*, 110 Wn.2d 859, 757 P.2d 512 (1988); *State v. Flett*, 40 Wn. App. 277, 278-79, 287, 699 P.2d 774 (1985).

Officer Foss interviewed P.H. approximately one and one-half to two hours after the alleged rape. When he first approached her, she was sitting in a chair in a hospital

room. Officer Foss observed P.H. had multiple red marks and small scratches around her upper chest and on her throat area, a bruise with a bleeding scratch on her forehead, and some bruising on her arms. He observed her sitting on a chair and "rocking back and forth. She was, you could definitely tell that she was excited or upset about something . . . ." RP at 220. P.H. then reported that Mr. Martinez had raped her anally. Based on P.H.'s condition, P.H. was still under the influence of the incident when she made the statement even though one and one-half to two hours had passed. Since P.H. was still under the stress of the event, the court had tenable grounds to allow her hearsay statement to Officer Foss. P.H.'s rape allegations were made about the same time to hospital personnel, which were admitted without objection at trial. Even if P.H.'s statements to Officer Foss were partly testimonial the other admissible hearsay from Ms. Grimm and the hospital personnel hearsay was before the jury, lessening any prejudicial effect.

Given all, we conclude the trial court did not abuse its discretion in allowing the hearsay evidence under the excited utterance exception.

Second, the rape shield statute limits the ability of either party to introduce at trial evidence of the past sexual behavior of the complaining witness. RCW 9A.44.020(2). The exclusion "of evidence under the rape shield statute . . . 'is within the sound discretion of the trial court.'" *State v. Aquirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (quoting *State v. Hudlow*, 99 Wn.2d 1, 17, 659 P.2d 514 (1983)).

Criminal defendants are guaranteed the right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The cross-examiner has traditionally been allowed to mount a general attack on the credibility of the witness or, more specifically, to reveal biases, prejudices, or ulterior motives of the witness. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, L. Ed. 2d 347 (1974). But a criminal defendant has no constitutional right to the admission of irrelevant evidence. *Hudlow*, 99 Wn.2d at 15.

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. The trial court has wide discretion in balancing probative value versus prejudice. *State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007).

Washington's rape shield statute provides, in relevant part, "Evidence of the victim's past sexual behavior . . . is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent." RCW 9A.44.020(2). "The purpose of the statute is to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of a victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent." *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842 (1984).

The rape shield law applies here. P.H.'s prior sexual conduct (including evidence of Mr. Villarreal's DNA) was sought to show she consented to anal intercourse with Mr. Martinez on May 14, 2010. This is exactly the irrelevant evidence our legislature excluded in RCW 9A.44.020(2). The trial court's ruling excluding past sexual behavior came under RCW 9A.44.020(2). Moreover, Mr. Martinez cannot show prejudice. The trial court excluded all evidence relating to P.H.'s past sexual behavior. Nevertheless, during cross-examination, defense counsel asked P.H. if she had consensual intercourse with Mr. Martinez the night before the rape, in which she answered yes. Thus, evidence that P.H. consented previously was before the jury. Ultimately, credibility determinations were left for the jury to decide. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Based on the above, we conclude Mr. Martinez was not denied a fair trial based on evidentiary error.

B. POAA Sentencing

The issue is whether the sentencing court erred in sentencing Mr. Martinez under the POAA. Mr. Martinez contends the POAA was enacted after his first strike conviction; therefore, it does not apply to him. He separately argues California's second degree robbery conviction is not comparable to Washington's second degree robbery conviction. Mr. Martinez, however, acknowledges this issue was recently decided against him in *Sublett*, 176 Wn.2d 58. There, the court held that the convictions in both states were comparable. *Id.* at 89. Mr. Martinez is correct, *Sublett* controls. We treat

Mr. Martinez's acknowledgement as a concession with the understanding he has made his concession in hopes of a change in the controlling case law.

Mr. Martinez argues the POAA violates the ex post facto clause of the United States and Washington Constitutions. Mr. Martinez reasons the POAA retroactively increases the punishment associated with his 1993-committed first strike crime.

The ex post facto clauses of the United States Constitution, article I, section 10, and the Washington Constitution, article I, section 23, prohibit the State from exacting any law that: (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender. *State v. Angehm*, 90 Wn. App. 339, 343, 952 P.2d 195 (1998) (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Washington courts have consistently rejected similar ex post facto arguments regarding the use of prior convictions in applying the POAA. *State v. Nordlund*, 113 Wn. App. 171, 192, 53 P.3d 520 (2002). The court rejected Mr. Martinez's argument in *Angehm*, which addressed whether the POAA aggravates a crime or increases the punishment for a prior committed act. *Angehm*, 90 Wn. App. at 343. The *Angehm* court determined that the POAA's increased punishment is triggered only upon the third

conviction of a "most serious offense." *Id.* Consequently, the POAA "does not retroactively increase the penalty for prior offenses." *Id.* The court went on to conclude:

> In this case, POAA was passed in November 1993, well before [the defendant] committed the robberies that constituted his third most serious offense. As previously stated, POAA's increased punishment is triggered only upon the third conviction of a most serious offense. . . . As a result, [the defendant] had fair notice that he would be sentenced to life without the possibility of parole if convicted of a third most serious offense.

Id. at 344. The court held that the POAA's mandatory life sentence does not constitute ex post facto punishment when applied to cases, as here, where the act constituting the third strike occurs after the POAA's enactment. *Id.*

Here, using Mr. Martinez's prior convictions to determine the POAA's application did not increase the punishment for his prior strikes; rather, the prior strikes were used only to calculate his current sentence for his post-POAA convictions. Because Mr. Martinez committed the third strike well after the 1993 passage of the POAA, he had fair notice of the life sentence before he committed that third offense. Therefore, no ex post facto violation is established by Mr. Martinez.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.